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No. 80-357

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

B. F. McMAHON, et al

Petitioners

v.

CITY OF VIRGINIA BEACH

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Mandatory Water Connection Ordinance of the City of Virginia Beach a valid and constitutional exercise of the State's police power to regulate the public health, safety and general welfare?

PARTIES

In the Supreme Court of Virginia, the parties were: B. F. McMahon, et al (listed in Appendix D of the Petition for Writ of Certiorari To The Supreme Court of Virginia, filed herein by the Petitioner), members of the unincorporated Committee to Save Our Wells, Appellants; and the City of Virginia Beach, Virginia, Appellee.

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The Respondent, City of Virginia Beach, respectfully prays that the Petition for a Writ of Certiorari, filed herein by the Petitioners, be denied.

STATEMENT OF THE CASE

Petitioners are the Committee to Save Our Wells, an unincorporated association of more than 200 individual landowners, including the named party B. F. McMahon. In proceedings below, Petitioners sought an adjudication that the Mandatory Water Connection Ordinance adopted in 1977 by the Virginia Beach City Council was unconstitutional and an injunction to prohibit the City and its agents from requiring Petitioners to comply with the Ordinance.

The parties agreed to a comprehensive stipulation of facts. An ore tenus hearing was also conducted; and on April 28, 1978, the trial court entered a final decree dismissing the Committee to Save Our Wells as a party and upholding the constitutionality and validity of the

Ordinance. The individual landowners appealed to the Supreme Court of Virginia, assigning error to the trial court's failure to rule that the City exceeded its power in adopting the Ordinance requiring them to connect with the City's water system and to pay various water connection charges.

Prior to adoption of the Ordinance, the landowners, who reside in various residential areas of the City, had at their own expense installed wells varying in depth from fifty (50) to one hundred sixty-five (165) feet, sufficiently deep to avoid contamination from septic tanks. Tests of some of the wells, which the City made at the request of the owners, revealed no bacterial contamination. Although the testing program was not complete, the parties stipulated that the

quantity and quality of the landowners' well water was good.

In the Summer of 1977, a serious drought in Tidewater Virginia caused the City and the City of Norfolk, from which Virginia Beach purchases all its water, to impose mandatory water conservation measures. Nevertheless, there was evidence that the City of Norfolk had recently increased its own water resources and expanded its treatment facilities sufficiently to assure an abundant supply of water for both municipalities until the end of the contract period.

Upon recommendation of the City Manager, City Council in March, 1977, adopted the Mandatory Water Connection Ordinance, providing in pertinent part as follows:

> Sec. 37-28. Connection required.
>
> The owner of any dwelling or other building in which human beings

> live or congregate shall, whenever a public water line hereafter is made available by the city, connect such building or dwelling with such water line within one year after such line becomes available.

The parties stipulated that the word "connection", as administratively construed by the City, means bringing the water service line to the dwelling. The line does not have to be brought into the dwelling but "should be readily asccessible if and when the supply is needed". It was further stipulated that the Ordinance prohibited "the cross-connection of City and well water".

Section 37-29 of the Code of City of Virginia Beach, Virginia, prescribed certain applicable connection and installation fees.

The average fee, per property owner, would be seven hundred seventy

dollars ($770.00). There was evidence that the average frontage of the landowners' lots exceeded one hundred (100) feet, and it was stipulated that the installation of the average eight (8) inch water line in front of a dwelling cost twenty-two dollars ($22.00) per linear foot. Thus, the average cost of installing a water line in the street abutting a landowner's property would be two thousand, two hundred dollars ($2,200.00).

Included in the Stipulation submitted by the parties was the following:

> K. Well water -
>
> (1) Subsurface wells could at any time become polluted without prior knowledge of the City or the plaintiffs. The Norfolk Water System is routinely monitored for water quality under the National Safe Drinking Water Act.
>
> (2) A prolonged water table decline could make plaintiffs' wells inoperable.

(3) A prolonged lack of electricity would render plaintiffs' wells useless.

(4) A significant drawdown of ground water might create a salt water intrusion in the plaintiffs' wells.

The likelihood of the foregoing to occur is small.

In its final decree the trial court ruled that §15.1-875, Code of Virginia, 1950, as amended authorizes a city, under the police powers set forth in §15.1-873, supra, to require connection of premises with a municipal water system; and in an opinion dated June 6, 1980, the Supreme Court of Virginia affirmed the trial court decision. Petitioners have accordingly filed this Petition for a Writ of Certiorari to the Supreme Court of Virginia.

REASON FOR NOT GRANTING THE WRIT

THE ORDINANCE IN QUESTION IS A VALID EXERCISE OF THE STATE'S POLICE POWER AND

DOES NOT VIOLATE ANY PROVISION OF THE UNITED STATES CONSTITUTION.

The essence of the Petitioners' argument for the issuance of Writ of Certiorari is their contention that the Mandatory Water Connection Ordinance of the City of Virginia Beach is an invalid exercise of the police power, having no reasonable relation to the public health, safety and welfare, and further that, in enacting such an ordinance, they have been deprived of a property interest without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Neither argument, however, when closely examined is anything more than a feeble attempt to raise a constitutional argument to a valid exercise of the State police power and totally lacks credibility or legal precedence.

As the Court below recognized in its opinion, which appears as Appendix C of the Petition, such ordinances are indeed valid exercises of the police power of a state and municipality. It has long been recognized that a state or city must be given broad discretion in enacting statutes or ordinances concerning public health. "The police power is one of the least limitable of governmental powers and in this operation often cuts down property rights." Hills Realty Company, Inc. v. Saxl, 328 U.S. 80, 66 S.Ct. 850 (1946), at page 851. The question of validity turns on the power of the legislature to deal with the prescribed class. Id.

In a very similar and controlling case, Hutchinson v. City of Valdosta, 227 U. S. 303, 33 S.Ct. 290 (1913), the Supreme Court of the United States recognized the validity of such mandatory connection

ordinances. In that case, the appellant attacked the validity of a mandatory sewer connection ordinance. The Supreme Court, in upholding the ordinance, held that it was not violative of the Fourteenth Amendment of the Constitution of the United States. The Court held that:

> "It is the commonest exercise of the police power of a state or city to provide for a system of sewers and to compel property owners to connect therewith. ... It may be an arbitrary exercise of the power could be restrained, but it would be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclucion that the City was induced by anything in the enactment of the Ordinance other than the public good, or that such was not its effect." Id., at 308.

Petitioner seeks to distinguish the Hutchinson case on the grounds that it deals with mandatory sewer connection and not mandatory water connection. Such a

distinction is totally without merit. The provisions of water and sewer services are, in fact, totally inseparable. Common knowledge dictates that it is impossible to dispose of sewage without an adequate and functional water supply. The test, as set forth in the Hutchinson case, is that the mandatory connection ordinance must not be arbitrary but must have some reasonable relation to public health measures. The Court below so found and there are adequate facts brought out in the Court below to establish a reasonable nexis with the public health benefits of the Ordinance in question. (See Appendix of Petition, page 14.) When such evidence of public health factors is present, the Ordinance must stand.

> One of the most important duties of government is the protection of the public health. Any legislation or action which tends to fulfill that duty falls

> within the police powers of states and is not violative of the Fourteenth Amendment so long as there is a real and substantial relationship between the action and the purpose of protecting the public health. Johnson v. Genesee County, Michigan, 232 F.Supp. 567 (E.D. Mich., 1964), citing United Enterprises v. Dubey, C.C.A.Fla., 128 F.2d 843, affirming, D.C., 42 F.Supp. 60, certiorari denied 317 U.S. 669, 63 S.Ct. 74, 87 L.Ed. 537.

Petitioners take the position that the due process question should be controlled by the case of Midway v. Midway Nursing Center, Inc., 230 Ga. 77, 195 S.E.2d 452 (1973). That case is clearly inapplicable to the case at bar. It should be noted that no where in that opinion is there any factual basis apparent for enactment of the particular ordinance stated therein. Further, the ordinance is considerably different from that enacted by the City of Virginia Beach in the case at

bar. Consequently, the Midway case has no precedential value herein.

The Petitioners argue that they are being deprived of their property rights without due process of law. The alleged deprivation is claimed to be the result of the Mandatory Water Connection Ordinance. Allegedly, such connection Ordinance deprives them of the use of their wells. Then, in the same breath, Petitioners turn around and allege that the Ordinance is not a valid exercise of the police power because it does not require them to use City water but rather only to connect. The fallacy of this line of argument is readily recognizable. As the Virginia Supreme Court indicated in the holding below, there is no compulsion on the landowners to use City water as long as the water coming from their wells is potable. Therefore, there is no taking. The important factor to

recognize is the necessity of a city or state to take appropriate steps, pursuant to its police power, to prevent future health hazards. The evidence is abundant, as found by the Court below, that in requiring mandatory connection to city water when the well water is no longer potable or for any other reason is unavailable, city water may immediately be used by the homeowner without any disruption in service. This would, logically, then prevent the multitude of problems connected with disruption in water service, not the least of which is sewage disposal. Until such time as that becomes necessary, however, the homeowners do not need to purchase City water or to refrain from using their wells. Consequently, there is clearly no taking.

Further, the Petitioners allege that the charging of certain fees for

connection to City water is a taking. As the Virginia Supreme Court noted, the record is clear that the homeowners are paying less than a third of the cost of City water being made available to their property. The charges, therefore, are much less than the actual benefit received and, therefore, are neither unreasonable nor unconstitutional.

CONCLUSION

For the foregoing reasons, it is respectively submitted that there was no constitutional deprivation of the Petitioners' property rights by enactment of the City Ordinance in question and that its enactment was a valid exercise of the State police power. Consequently, the

Petition for a Writ of Certiorari should be denied.

Respectively submitted

CITY OF VIRGINIA BEACH

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Supreme Court Rules, I mailed (forty) 40 copies of this Brief of Respondent in Opposition to Petition for Writ of Certiorari to The Honorable Michael Rodak, Jr., Clerk, United States Supreme Court, via certified mail, return receipt requested, and that a copy of said Brief has been mailed, via United States Mail, to Paul M. Lipkin, Esquire, Goldblat, Lipkin, Cohen, Anderson & Jenkins, P.C., 804 Plaza One Building, Norfolk, Virginia, 23510, counsel for Petitioners, and that all items have been properly addressed with sufficient postage thereon to insure delivery.

Charles M. Sallé

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